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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

No. 72-433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

REPLY BRIEF OF THE INTERSTATE COMMERCE COMMISSION

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1. In their continuing attack on the Commission's use of the Docket 17000, Part 7, rate level as a yardstick of maximum reasonableness of the in-transit inspection charge when added to existing line-haul rates, appellees once again argue that the Commission has

never relied on such a standard previously and that the Docket 17000, Part 7, rates are merely "paper" rates which provide no proper indication of reasonableness.[1] First of all, we pointed out in our main brief that the Commission has previously utilized prescribed rates as subsequently adjusted by general increases as a measure of maximum reasonableness, even where the operating rate level is lower. See, *e.g.*, ICC Brief, p. 41; *Public Service Commission* v. *Great Northern Ry.*, 340 I.C.C. 739; *Grand Forks Chamber of Commerce* v. *Great Northern Ry.*, 321 I.C.C. 356; *Alabama State Docks Dept.* v. *Alabama, T.&N. R. Co.*, 321 I.C.C. 347, 353; *Aysco Chemicals, Inc.* v. *Alabama G.S.R. Co.*, 314 I.C.C. 725, 733. The question of "paper" rates is but another aspect of the same issue. Rates may be adjusted within a zone of reasonableness (*United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 506), and there is no requirement that the rate prevailing at the moment be considered the highest reasonable rate. *Cf. Alabama State Docks Dept.* and *Aysco Chemical, supra.* Where, as here, a carefully considered maximum level has been developed over the years but for competitive reasons does not always move the traffic, it is nevertheless a valid reasonable maximum. As the Commission has previously recognized,

[1] The Wichita appellees contend that the Commission is precluded by Rule 15 of the rules of this Court from addressing itself to the district court's decision on the merits (Brief, p. 13). However, Commission counsel was assured by the Clerk of Court that it would be proper to discuss all issues presented by both appeals herein in view of the Court's order of November 13, 1972, noting probable jurisdiction and consolidating the appeals.

such a standard may be more reflective of reasonableness than the operating level of rates, which is frequently depressed by competition in a volatile market. See, *e.g., Fargo* v. *Chicago, M., St. P. & P.R. Co.*, 329 I.C.C. 650, 654; *Atlantic Creosoting Co., Inc.* v. *Southern Ry. Co.*, 323 I.C.C. 533, 538; *Whatcom County Traffic and Rates Bureau* v. *Chicago, M., St. P. & P.R. Co.*, 287 I.C.C. 442, 443. The evidence of record clearly shows that such a competitive effect exists in the transportation of grain (see, *e.g.*, Exh. 14, Schedule 4; Exh. 22, Appx. JE2; Exh. 24, pp. 4–5; Exh. 25, p. 2).

2. Now for the first time before this Court, the Wichita appellees raise the question of the effect of the in-transit charges on traffic diversion to competing modes of transportation, and accuse the Commission of improperly shifting a burden of proof to the grain interests. These contentions, which were raised below but not disposed of by the district court, are without merit.

After noting that a likelihood of substantial diversion and a concomitant diminution of railroad revenues was one of its reasons for rejecting increased charges in *Transit Charges, Southern Territory*, 332 I.C.C. 664, the Commission found in the instant case that "[s]imilar conclusions are not warranted here" (App. 39). This was an entirely justifiable conclusion in view of appellees' conspicuous failure to back up claims of diversion which could best be supported by their own evidence.

This Court has held that if a carrier in a Section 15(7) proceeding demonstrates that its proposed rate will be just and reasonable with respect to its own revenue requirements, an opposing carrier claiming inherent cost advantages has the burden of persuading the Commission of the existence of those advantages. *Interstate Commerce Commission* v. *New York, N.H. & H. R. Co.*, 372 U.S. 744, 760 n.12. The situation here is materially the same. The railroads showed a favorable revenue effect from the in-transit charges in two respects: to the extent they were collected they were reasonable; and, to the extent inspection was bypassed, a vastly improved revenue picture would result from increased car utilization (App. 55, 57).

Against this background, appellees failed markedly to substantiate any reasonable claim of diversion, and such evidence as was presented was quickly rebutted by the railroads. A number of witnesses made generalized claims before the Commission that shippers would direct traffic to other modes because of the inspection charge, but none successfully established either the relative costs involved or, equally important, the causal connection between diversion to other modes and this particular charge. In contrast, the railroads were able to show, *inter alia,* that unregulated truck and barge rates fluctuate constantly and tend to parallel rail rates (Exhibit 146, p. 5); and that the inspection charge, in the context of all things affecting competition between railroads and other modes, would have little if any significant impact. As an example of this latter point, the railroads established by cross-examination of a witness relied on by

the grain interests that motor carriers are generally used for short-haul traffic in any event and the inspection charge would not likely alter the competitive balance (R. 1237), and that rail transportation is used in some instances even when motor transportation is cheaper because of other advantages, such as transit privileges and greater accessibility to markets (R. 1238–40). On such facts the Commission properly concluded that it could not find that diversion would result from imposition of the in-transit charge.

The Commission in no way shifted the burden of proof to appellees by its treatment of the diversion question. Diversion is largely a matter within a shipper's competence to prove, since the choice of transportation is his decision to make; the Commission has accordingly required that such claims be supported by those who make them. *E.g., Increased Freight Rates, 1968,* 332 I.C.C. 714, 716; *Chesapeake & O. Ry. Co.—Control—Baltimore & O.R. Co.,* 317 I.C.C. 261, 282. This Court has agreed that parties raising issues within their own competence to illuminate with evidence have the obligation to do so regardless of the ultimate burden of proof. *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co., supra; Interstate Commerce Commission* v. *J–T Transport Co.,* 368 U.S. 81, 90. Such a requirement neither "bears upon" the burden of proof nor "subverts" it (*United Gas Pipe Line Co.* v. *Federal Power Comm'n,* 206 F. 2d 842, 845 (2d Cir.)), and in fact equitably distributes obligations in an administrative proceeding for the purpose of arriving at the truth without unreasonable difficulty and expense. *Atlanta-New Orleans*

Motor Frt. Co. v. *United States,* 197 F. Supp. 364 (N.D. Ga.). No one disputes that the railroads here had the ultimate burden in this proceeding to show the inspection charge to be just and reasonable, but to infer that the Commission unlawfully shifted the burden on the diversion issue is unwarranted.

3. The Wichita appellees seek to cast the inspection charge in terms of an intention of the railroads and the Commission to destroy the grain marketing system as it has heretofore existed. This argument is deficient for several reasons.

Throughout these proceedings appellees have faulted the Commission for its method of arriving at the overall *level* of rates caused by imposition of the separate charge for inspection. But in defending in-transit inspection as an integral part of a marketing system they wish to protect, the Wichita appellees in effect are saying that there should be no avoidable separate charge for this service at all. Any such conclusion completely, even callously, disregards the evidence of disruptions caused by the in-transit inspection process, and is clearly an attempt to substitute the judgment of private parties for that of the Commission.[2]

The Wichita appellees suggest that the Commission misused the legislative history of the 1968 amend-

[2] It is noteworthy that the Secretary of Agriculture makes no similar contention; in fact, he states that the imposition of a separate charge may be justified and that it is the imposition of such a charge which tends to discourage in-transit inspection (USDA Brief, p. 23). Thus even the Secretary implicitly acknowledges the deficiencies in the Wichita appellees' defense of in-transit inspection.

ments to the Grain Standards Act as support for its approval of the in-transit charge. Such an argument misapprehends the purpose behind consideration of that legislative history. Congress did not by that legislation expressly authorize a separate inspection charge, but it did nonetheless evince the hope that removal of the mandatory inspection requirement would improve car utilization and efficiency of operations generally (see ICC Brief, pp. 18–24). For appellees now to rely upon the subsequent failure of in-transit inspections to decline in number as evidence that Congress did not intend to eliminate them misconstrues the evidence completely. No other conclusion can reasonably be drawn than that Congress obviously hoped for a substantial reduction in the number of in-transit inspections.[3]

The legislative history of the 1968 amendments also shows that nearly everyone involved with grain transportation, including a large number of the present appellees, agreed with Congress that in-transit inspection is a seriously disruptive practice. For appellees now to suggest that the very procedure which was admittedly so seriously deficient in 1968 is now essential to the health of the grain trade constitutes incon-

[3] Congress' continuing concern over car utilization and efficient transportation of grain, of which we spoke in our main brief (pp. 18–24), was most recently evidenced by the passage of a Senate resolution "relating to the railroad transportation crisis caused by the freight car shortage and other factors." See S. Res. 59, 93d Cong., 1st Sess., February 19, 1973; S. Rep. No. 93-16.

sistency and indifference to the consequences of inefficient transportation of grain.

Ultimately involved is the question of who is the guardian of the public interest—the Commission or the grain concerns. This Court has clearly held that this task belongs to the Commission, which is delegated this responsibility by Congress. The Commission must perform this function even if, as these appellees claim, some segment of the economy may be affected adversely by its decisions. *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 580; *Dixie Carriers* v. *United States,* 351 U.S. 56, 60; *Arrow Transp. Co.* v. *United States,* 176 F. Supp. 411, 420 (N.D. Ala.) aff'd *per curiam,* 361 U.S. 353. Compare *Arrow Transp. Co.* v. *Southern Ry.,* 372 U.S. 658 (dissenting opinion).

4. In their defense of the district court's unlawful arrogation of the power to suspend rates, appellees continue to maintain that such a power is condoned by the case law and mandated by policy. Such contentions are without foundation.

In arguing that *Arrow Transp. Co.* v. *Southern Ry.,* 372 U.S. 658, is inapplicable to the present situation, appellees profess to see legislative history and judicial precedent which support the lower court's suspension of the in-transit charge. Thus the Secretary of Agriculture, in a lengthy discussion of the Mann-Elkins Act of 1910, 36 Stat. 539, perceives in the creation of the Commerce Court, and its subsequent abolition and transfer of jurisdiction to three-judge district courts, a Congressional intention to authorize court injunctions against rates. Similar contentions are made by

the Wichita appellees on the basis of extracts from the Congressional debates on the Mann-Elkins Act. But, as the language of the present judicial review statutes makes clear, it is injunctions against *Commission orders* which may be granted by the reviewing courts in their discretion, a point not disputed by appellants. See 28 U.S.C. §§ 1336(a), 1398(a), 2284(5), 2321, 2324, 2325. Indeed, the passages of legislative history cited by appellees say nothing about any supposed power to enjoin rates but merely describes the power being conferred on the courts to enjoin Commission orders—an entirely different matter. As Judge Friendly expressly held in *National Small Shipments Traffic Conference* v. *United States,* 321 F. Supp. 500, 515 (S.D. N.Y.), relying squarely on *Arrow,* a court's power to annul, set aside, vacate, or permanently enjoin a Commission *order* does *not* embrace a power to enjoin the continued application of rates.[4] That power, as this Court held in *Arrow,* lies exclusively in the Commission.

Appellees additionally suggest that a power of the district court to suspend rates pending reconsideration by the Commission must be inferred from the "equitable powers" of the reviewing court—powers

[4] The Secretary of Agriculture argues that *National Small Shipments* is inapposite because the court there held only that it could not direct the *Commission* to suspend the rates in question (USDA Brief, p. 35). But it is precisely because the court interpreted *Arrow* to mean that only the *Commission* can suspend (and that the suspension period had already been used up) that the court found itself without power to suspend the rates further. Of all the lower court cases relating to *Arrow* cited by the parties, *National Small Shipments* is quite obviously most in point.

allegedly necessary to prevent harsh results against shippers. What appellees fail to recognize is that the seven-month suspension period is in itself a substantial concession to shippers in the context of what is basically a carrier management decision, *i.e.*, whether or not to change the level of rates. Section 15(7)'s authorization of a limited seven-month suspension of a rate change, coupled with the power granted the Commission thereafter to require an accounting and refund, reflect what this Court in *Arrow* recognized as a carefully considered Congressional judgment as to the length of time a carrier should be prevented from instituting its own rate changes, and the extent to which affected shippers should be protected from the consequences of such changes. That judgment is dispositive of this issue. With this in mind it cannot reasonably be argued that the courts would be given back the power to suspend which was taken away in the first instance, thereby upsetting the delicate balance between carrier and shipper so carefully delineated by Congress. *Arrow, supra,* 372 U.S. at 664.

The Wichita appellees suggest further that a failure to permit judicial suspension in connection with a court remand subjects shippers to higher rates during an unduly long period of time while the Commission reconsiders the rate proposal.[5] But this argument as-

[5] Of course, the district court here purported to suspend not only during the period of reconsideration, but also until further order of the court itself (App. 106). This provision thus seems to envision a second round of judicial review, despite the fact that the Commission has not yet acted and no one knows in advance what the result would be if reconsideration does take place.

sumes that the Commission proceeding on remand will necessarily be a protracted one. There is no basis for such an assumption. Here, the lower court reversed the Commission's decision essentially upon the basis of what that court regarded as inadequate findings. On remand, it would not appear to be necessary to conduct further proceedings, and a decision incorporating additional findings should be forthcoming within a relatively short period of time. And in any event both the Commission and the courts possess ample power to prevent excessive delays or other abuses of the administrative process. Compare *City of New York* v. *United States*, 337 F. Supp. 150, 164 (E.D. N.Y.); *In re Penn Central Transportation Co.*, 329 F. Supp. 572, 577 (E.D. Pa.); *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212, 225 (8th Cir.).

Finally, we submit that appellees' emphasis on the plight of the shippers is completely one-sided, and ignores the equally compelling plight of the railroads if their contentions were to be adopted. In order for shippers to enjoy the benefit of further suspension when the charges in question have never been found by the Commission not to be just and reasonable, the railroads would have to bear irretrievable losses during the period of suspension, with no hope of recouping any of the lost revenues if the rates are ultimately found to be lawful. These losses would have to be added to losses already borne by the carriers during the initial seven-month suspension period authorized by Congress. As pointed out in our main brief (*e.g.*, p. 50), this very case illustrates the gravity of the prob-

lem: if suspension were now permitted, the entire in-transit charge, with its demonstrably beneficial effect on car supply and carrier operations, would be summarily discarded. That is just the kind of eventuality which this Court in *Arrow* recognized and sought to avoid.

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed, and the case remanded with directions to sustain the Commission's orders under review.

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